

### **REMARKS/ARGUMENTS**

Claims 1 and 3-14 are pending. Solely in an effort to advance prosecution, claim 7 is amended to encompass potentially infringing subject matter. No new matter has been added. By the above amendment, Applicant does not acquiesce to the propriety of any of the Examiner's rejections and does not disclaim any subject matter to which Applicant is entitled. *Cf. Warner Jenkinson Co. v. Hilton-Davis Chem. Co.*, 41 U.S.P.Q.2d 1865 (U.S. 1997). Further, Applicant reserves the right to file continuing applications to cover disclosed subject matter not encompassed by the currently pending claims. It is believed that the above-captioned patent application is condition for allowance.

### **INFORMATION DISCLOSURE STATEMENT**

The Office Action states that references mentioned in the specification should be cited in an Information Disclosure Statement and listed on an accompanying Form PTO/SB/08a in order to be considered by the Patent Office. In response, Applicants have concurrently submitted an Information Disclosure Statement to obtain express consideration of the references mentioned in the specification, as suggested.

### **DOUBLE PATENTING REJECTION**

The Office Action rejects claims 8, 9, 10, and 14 under the judicially created doctrine of double patenting over claims 1-9 of Besette (U.S. Patent No. 6,506,707 ("Besette")). Although Applicant respectfully disagrees for the reasons already of record, Applicant respectfully requests that this rejection be held in abeyance until an indication of allowable subject matter. Applicant will file a Terminal Disclaimer at that time if ultimately deemed necessary.

**REJECTION UNDER 35 U.S.C. § 103(a)**

The Office Action rejects claims 1 and 3-14 under 35 U.S.C. § 103(a), as allegedly being unpatentable over Yu et al. (U.S. Patent No. 5,811,079), Tworkoski (Journal Reference: “Herbicide Effects of Essential Oil,” *Weed Science*, 50(4):425-431 (2002)) and Faust ([www.bioag.com/fulvi-seedtreat.html](http://www.bioag.com/fulvi-seedtreat.html)). Applicant respectfully traverses this rejection.

Yu, alone or combined with Tworkoski and Faust, does not disclose or suggest the features of the presently claimed invention. In particular, Yu nowhere teaches or suggests a herbicidal compositions or method of using same wherein the herbicidally active ingredient **consists of** clove oil and either thymol, thyme oil, or methyl salicylate, with or without humic acid or fulvic acid, as presently claimed. At best, Yu discloses anticalculus dentifrice compositions that contain an “active” antimicrobial agent selected from the group consisting of thymol, eucalyptol, methyl salicylate, and mixtures thereof; a pyrophosphate ion; and an orally acceptable carrier (col. 3, lines 17-24). Yu also discloses that essential oils optionally may be included (col. 3, lines 50-54). As such, according to Yu, the “active ingredient” must comprise more than the active ingredients recited in the present claims.

Tworkoski does not remedy the deficiencies of Yu. Tworski merely discloses that essential oils may be useful as “natural product herbicides’ for organic farming systems” (p. 425). Tworkoski discloses injury rates as a function of concentrations of essential oils and attempts to classify the “active ingredients” within essential oils that cause injury. Tworski does not teach or suggest the specific combination of active ingredients and/or adjuvants recited in the claims. Applicant respectfully submits that one of ordinary skill in the art reading Yu in view of Tworski would not have been motivated to reach the presently claimed invention.

Faust does not remedy the deficiencies of Yu and Tworkoski. Faust merely discloses the use of humic acid and fulvic acid for treating seed to encourage optimum levels of *growth and production*. Faust does not disclose or suggest combining humic acid or fulvic acid with the plant essential oils presently claimed to obtain an herbicidally active composition, nor does it teach or suggest using humic acid or fulvic acid for use with an herbicidally active composition. Accordingly, Applicant respectfully submits that one of ordinary skill in the art reading Yu alone or in combination with the teachings of Tworkoski and/or Faust would not have reached the claimed composition and method for using same.

In addition, the Office Action notes that no example in the disclosure contains only clove oil and thyme oil as recited in the claims. On the contrary, Applicant respectfully submits that the specification at paragraph 0023 states:

...A non-limiting example is a herbicidal composition comprising an herbicidally acceptable carrier (e.g., water, lecithin and/or sodium laurel sulfate) and an active ingredient, wherein the active ingredient either comprises, consists essentially of, or consists of: clove oil and thyme oil.

In view of the above, it is respectfully submitted that the Office Action has not made out a *prima facie* case for obviousness of the invention as a whole at the time the invention was made. Rather, it has shown that, with hindsight, the various bits and pieces may be found in the prior art using Applicant's claims as a road map. This is a forbidden approach. *See, Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 228 U.S.P.Q. 90, 98 (Fed. Cir. 1985) (stating that hindsight is a tempting but forbidden zone). "One cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention." *In re Fine*, 837 F.2d 1071, 5 U.S.P.Q.2d 1596 (Fed. Cir. 1988). Indeed, the inappropriateness of

hindsight as a test for obviousness was, in point of fact discovered, and articulated lucidly, over three centuries ago, by Milton, who, in *Paradise Lost*, Part IV, L. 478-501, stated, in dictum:

The invention all admired, and each how he  
To be the inventor missed; so easy it seemed,  
Once found, which yet unfound most would have thought,  
Impossible!

*Gillette Co. v. S.C. Johnson & Son, Inc.*, 919 F.2d 720, 16 U.S.P.Q.2d 1923 (Fed. Cir. 1990) "As in all obviousness determinations, the decisionmaker must bring judgment to bear. It is impermissible, however, simply to engage in a hindsight reconstruction of the claimed invention, using the applicant's structure as a template and selecting elements from references to fill the gaps." *In re Gorman*, 933 F.2d 982, 18 U.S.P.Q.2d 1885 (Fed. Cir. 1991).

Thus, for at least the above reasons, Applicant respectfully requests reconsideration and withdrawal of this rejection.

## **CONCLUSION**

If anything further could be done to place the above-captioned patent application in better condition for allowance (i.e., via Examiner's Amendment), then please contact the undersigned attorney at the telephone number listed below.

*[Remainder of page intentionally left blank.]*

Applicant(s) hereby requests any extension of time deemed necessary for entry of this submission and any submission filed hereafter in this application or any continuing application(s). Applicant(s) makes a Conditional Petition for any relief available to correct any defect in connection with this filing, or any defect remaining in this application after this filing. The Commissioner is authorized to charge any petition fee or any deficiency in fees filed, or asserted to be filed, or which should have been filed herewith (or with any paper filed hereafter) to Deposit Account No. **14-1140 (please use reference number: WFG-4380-150)** or credit any overpayment of fees to such Deposit Account.

Respectfully submitted,

**NIXON & VANDERHYE P.C.**

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